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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1965

No. 426

LILLIAN WALL BAIN, *Petitioner*,

v.

JOAN BAIN NICODEMUS, and JAMES G. BAIN,
*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JAMES E. HOGAN
410 Shoreham Building
Washington, D. C. 20005
*Counsel for Petitioner*

August, 1965

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LILLIAN WALL BAIN, *Petitioner,*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit reversing a judgment of the United States District Court for the District of Columbia which construed her late husband's will in favor of the petitioner.

## OPINION BELOW

The opinion of the Court of Appeals is reported at 344 F. 2d 501 and printed as an appendix to this petition.

## JURISDICTION

The judgment of the Court of Appeals was entered on January 7, 1965, and a petition for rehearing, or, in the alternative, for rehearing en banc, was denied on May 6, 1965. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution of the United States provides, in pertinent part, as follows: "No person shall . . . be deprived of . . . property, without due process of law. . . ."

## QUESTIONS PRESENTED

I. Whether one is denied due process of law by a Court of Appeals if his case is decided without affording him the opportunity to present oral argument.

II. Whether this Court, in the exercise of its supervisory power over the Federal Courts, will permit a Federal Court of Appeals to decide a case on the merits without affording an opportunity for oral argument to the parties.

## STATEMENT

Petitioner's late husband left a will which in one paragraph expressly devised and bequeathed to her "all her statutory rights in [his] real and personal property," and in a later paragraph provided that the

residue of his estate should be divided among the petitioner and the respondents, his two children, "share and share alike." (R. 7, 9) His executor filed a suit in the United States District Court for the District of Columbia to construe these provisions of the will, and he named the petitioner and the respondents as defendants. (R. 2-6)

Cross-motions for summary judgment were filed by the petitioner, and by respondents. (R. 13, 15) Each motion was predicated on the language of the will itself, which each side read as compelling a construction of the will in its favor. The District Court granted petitioner's motion for summary judgment, and denied that of the respondents. (R. 19)

Respondents appealed to the United States Court of Appeals for the District of Columbia Circuit. (R. 20) The only point made in their printed brief was that as a matter of law their interpretation of the will was the correct one. This was necessarily the only point to which the petitioner's brief was addressed. (R. 21-31) And this was necessarily the only point before the Court of Appeals when the oral argument was held.

After the oral argument the appellate court ruled "that the record before us is inadequate to permit proper review by this court of the decision under appeal," and it remanded the case to the District Court with instructions to "supplement the record by holding a hearing on the subject of the testator's intentions" and to make findings of fact and conclusions of law thereon. (Appx. 1a; R. 32)

The District Court proceeded to conduct the evidentiary hearing, during the course of which testi-

mony was taken and exhibits were received in evidence. (Orig. R. 63) Findings of fact and conclusions of law were made by the District Court, and its ruling was again in favor of the petitioner. (Orig. R. 49-62)

The District Court then returned the record to the Court of Appeals (Orig. R. 48), and each side filed a written "supplemental memorandum" directed to the findings and conclusions reached by the District Court at the evidentiary hearing conducted pursuant to the remand.

Instead of setting the case down for oral argument, a three-judge panel of the Court of Appeals proceeded to release an opinion, from which one of its members dissented, reversing the District Court's decision and directing that the Motion for Summary Judgment filed by the respondents be granted. (Appx. 2a; R. 33-44) Petitioners filed with the Court of Appeals a petition for rehearing, or, in the alternative, for rehearing en banc, in which the decision of the Court of Appeals was criticized not only on the merits but also on the procedural ground that the only oral argument held in the case had occurred when the record before the Court of Appeals was, by that Court's own statement, "inadequate to permit proper review by this court of the decision under appeal"; and that no oral argument had been conducted by the Court of Appeals after the record, supplemented as it was by the evidentiary hearing which the Court of Appeals directed, had become adequate to permit review by that Court. (R. 46-50)

Petitioner's petition for rehearing was denied by a two-to-one vote (R. 55); her petition for rehearing

en banc was denied by a four-to-three vote. (Appx. 13a; R. 56)

## REASONS FOR GRANTING THE WRIT

The right to due process of law is one of the most important constitutional rights of the citizen. No claim that a violation of this right has occurred should be permitted to go without independent appellate review. In perhaps ninety-nine per cent of the federal cases where a litigant asks this Court to review his claim that he has been denied procedural due process of law, he has already received one independent appellate review of his contention by a Circuit Court of Appeals. In this unusual case, however, petitioner is claiming that the denial of due process of law occurred not at the trial level, but at the appellate level. Therefore, this Court is the *only* forum to which the petitioner can turn for independent review of her claim. The writ of certiorari should be granted in this case lest a claim that there has been a violation of a constitutional right go without appellate review.

It is clear from the procedural facts in this case that the petitioner has been deprived of a valuable judgment, embodying important rights in her late husband's estate, by the decision of an appellate tribunal which has never accorded to her a meaningful oral hearing of her case. To be sure, there was an oral hearing conducted in this case by the United States Court of Appeals for the District of Columbia Circuit, but that hearing occurred when, by the Court's own statement, the record before it was "inadequate to permit proper review by this court of the decision under appeal." It was only after the District Court

had conducted the evidentiary hearing, as ordered by the Court of Appeals, that the record in this case became adequate for appellate review. And it was only at that time that this case was in a posture where the litigants could be given an effective oral hearing by the Court of Appeals.

However, instead of affording an oral hearing, the Court of Appeals in effect forced the submission of this case on the briefs. The practice of submitting on the briefs is forbidden by some courts and discouraged by others. In discussing the action of the Supreme Court of New Jersey in refusing to permit counsel to submit a case on the briefs, its late Chief Justice Arthur T. Vanderbilt stated that the action was prompted in part by "the thought that cases that are not argued are not well decided." See Vanderbilt, *A Unified Court System,* 9 F.R.D. 629, 639 (1949). The same conviction is reflected in Rule 45(1) of this Court: "The Court looks with disfavor on the submission of cases on briefs, without oral argument, and therefore may, notwithstanding such submission, require oral argument by the parties."

Indeed, the rules of the United States Court of Appeals for the District of Columbia Circuit are written on the assumption that all litigants have a right to an oral hearing of their case on the merits. Rule 4(c) provides that, after a case has been docketed and calendared, "counsel shall be notified by the clerk of the date assigned for the hearing of a case." The Court's description of the oral argument phase of an appeal as a "hearing" is indicative of the importance of this step in the appellate process. Since no oral argument was permitted on the record produced by

the remand, the petitioner has suffered a reversal of a judgment in her favor without being accorded a "hearing" on a record adequate to permit effective appellate review.

Although the Court of Appeals, unlike the Supreme Court of New Jersey, permits submission of a case on briefs, and although its rules, unlike those of this Court, contain no express disapproval of the practice, its Rule 19(d) makes it clear that this is to occur only "if counsel choose to submit it in that manner." The Court of Appeals has no rule establishing a different procedure in cases where a remand occurs after an abortive oral argument.

Petitioner would be carrying coals to Newcastle were she to undertake in a petition addressed to this tribunal any elaborate development of the significant role played by oral argument in the decisional process on appeal. Rule 45(1) of this Court is the best witness to its recognition of the importance of oral argument. Since oral argument is so important and so valuable a part of the appellate process, this Court should review the question of whether it is within the power of a Court of Appeals to deny it to any litigant. Petitioner submits that an oral argument is a part of appellate due process of law.

> "The privilege of being heard orally before the court prior to final judgment is a right, which, though subject to reasonable regulation by the court, cannot justly be denied to any party litigant making seasonable application therefor. 'Hear before you strike,' was a maxim of the ancient jurists." *Bullock* v. *McGerr,* 14 Colo. 577, 23 P. 980, 983-4 (1890).

Even if a court were free to deny this right in the first instance, it should not be free to ignore the right once it is conferred by its own rules and/or settled practice.

> "The statute relied on is but a repetition of the standing rule of this court in force several years prior to its enactment. This rule the court has always regarded as obligatory, and never, to my knowledge, has an oral argument upon final hearing of a cause been refused, when proper application was made therefor." 23 P. at 985.

Section 1291 of Title 28 of the United States Code confers on litigants the right to have the decisions of a District Court reviewed by a Court of Appeals. This review must be carried out according to due process of law. The uniform method of conducting this appellate review in the federal system has been to follow the filing of briefs by the parties with an oral argument before the judges who are to decide the case. Since this Court frowns on the *voluntary* submission of cases on briefs, it should, in the proper exercise of its supervisory power over the lower federal appellate courts, consider the question of whether it will permit those courts to force such a practice upon an unwilling litigant.

The petitioner does not ask this Court in any way to review the merits of this suit to construe a will. She asks only that this court review the question of whether this case should not be remanded to the United States Court of Appeals for the District of Columbia Circuit with instructions to schedule an oral argument of the case before three judges of that Court. In other words, the petitioner is simply seeking review of her claim of a violation of her constitutional rights to due process

of law, which claim, if not reviewed by this Court, will never have received independent appellate review.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

JAMES E. HOGAN
410 Shoreham Building
Washington, D. C. 20005
*Counsel for Petitioner*

August, 1965

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# APPENDIX

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# APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
SEPTEMBER TERM, 1963

No. 17,830

District Court Civil No. 270-63

JOAN BAIN NICODEMUS, ET AL., *Appellants,*

v.

LILLIAN WALL BAIN, *Appellee.*

Filed January 28, 1964

Appeal from the United States District Court for the District of Columbia.

Before: FAHY, WASHINGTON and MCGOWAN, Circuit Judges.

## Order

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. It appears to the court that the record before us is inadequate to permit proper review by this court of the decision under appeal, and it further appears to the court that the cause should be remanded so that the District Court may supplement the record by holding a hearing on the subject of the testator's intentions, and particularly with respect to Paragraph 3 of the will, including, for example, the financial circumstances of the appellee widow and the appellant children, prior to the execution of the will, and as to the decedent's attitudes generally toward them, and as to any other circumstances offered by the parties which might shed independent and relevant light on the decedent's testamentary intentions, and making findings of fact and conclusions of law thereon.

It is therefore ORDERED that this cause be remanded for further proceedings not inconsistent herewith.

Per Curiam.

Dated: January 28, 1964

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,830

JOAN BAIN NICODEMUS, ET AL., *Appellants*,

v.

LILLIAN WALL BAIN, *Appellee*.

Appeal from the United States District Court
for the District of Columbia

Decided January 7, 1965

*Mr. J. L. Monarch* for appellants.

*Mr. Dennis Collins*, with whom *Mr. William J. Fitzgerald* and *Miss Nelle L. Ingels* were on the brief, for appellee.

Before: FAHY, WASHINGTON and MCGOWAN, Circuit Judges.

WASHINGTON, *Circuit Judge*: This is an appeal from an order of the District Court in an action brought by an executor for construction of a provision of a will.

In Paragraph 3 of the will the testator gave, devised, and bequeathed to his wife "all her statutory rights in my real and personal property wheresoever the same may be situated or located at the time of my death." In Paragraph 9 of the will the testator gave, bequeathed, and

devised the entire residue of his estate to his wife and his two children (a son and a daughter)—

> "share and share alike, with the proviso that if my said wife should predecease me, then her share shall lapse and the residue of my estate shall be distributed equally between my two children. Should either one or both of my children predecease me, however, the issue of my predeceased child shall take in their place and stead, per stirpes and not per capita."

The case centers on the construction to be given to the language of Paragraph 3, concerning "statutory rights."[1]

Facts alleged in the complaint and admitted were that the decedent's two children are children of a former first marriage; that on December 28, 1956, the decedent (at the age of 76) married his second wife, who survived him and is the intended beneficiary of Paragraph 3; that he was a resident of the District of Columbia; that he died on October 20, 1960, at the age of 80; and that the will was executed about 9 months before his death.

The case first came before the District Court on cross-motions for summary judgment filed by the widow and the two children. On April 22, 1963, the District Court, without hearing any evidence tending to illuminate or explain the intention of the testator with respect to Paragraph 3 (or any other provision) of the will, found as a matter of law, without opinion, that Paragraph 3 of the will—

> "declares a pecuniary bequest to . . . [the widow] of the value of the share in the real and personal estate which she would have taken had the decedent died intestate"

---

[1] Paragraphs 4 through 8 of the will provided for small monetary legacies to named grandchildren, great grandchildren, a brother, a sister, and two persons named for the testator; these monetary legacies have been paid and are not here directly involved.

and decreed that—

> "(a) In addition to one-third of the residue under paragraph 9 of the will, the widow is entitled to the value of an intestate share in personalty, pursuant to D.C. Code, Title 18, § 703.
>
> "(b) That the decedent left real estate in the District of Columbia, Arizona, Tennessee and Pennsylvania in which the widow is also entitled to the value of an intestate share"

in accordance with named statutes.[2] The testator's two children appealed.

This court heard argument, but found the record inadequate, in the absence of evidence as to the testator's intention with regard to Paragraph 3 of the will, to permit proper review of the District Court's construction of that paragraph. Accordingly, we remanded for an evidentiary hearing as to the intention of the testator. After holding the hearing, the District Court made findings of fact and conclusions of law, reaching the conclusion that the "will should finally be construed in accordance with the order" previously entered. We must now decide whether the District Court's construction accords with the testator's intention insofar as it is shown by the language used and the evidence of record.[3] We first give our views as to the meaning of the testamentary language, considered apart from any extraneous evidence, and next consider the impact of the evidence which was introduced at the hearing on remand.

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[2] These were D.C. CODE §§ 18-101 and 18-201a (1961); ARIZ. REV. STATS., Title 14, § 201; TENN. CODE ANNO. §§ 31-601 through 31-603; and PA. CODE, Title 20, ¶ 1.2 (§ 2(1), Intestate Act of 1947).

[3] The testator appears not to have explained his intentions in writing (other than in the will) and not to have discussed the provisions of his will with anyone other than the attorney who drafted it. That attorney is now dead and her testimony is not available.

## I.

It was stipulated that the attorney who drafted the will was a competent draftsman of wills, and the District Court found that she was an "experienced attorney specializing in probate matters and an expert draftsman of wills." Taking that to be so, and unless there is convincing evidence that the actual intention was otherwise, the language of the will must be given effect as it stands without revision, added embellishment or enlargement. In that posture, Paragraph 3 gives to the wife all the rights in the testator's real and personal property which she had under applicable statutes at the time of the testator's death.[4] This must mean that the statutes apply—with their limitations—in determining those rights. The testator died testate and the validity of the will is unchallenged. The "statutory rights" bequeathed to the widow are those which accrue to her in that situation. As will be shown, there are substantial statutory rights accruing to a widow when her husband dies testate, which do not depend on intestacy.

We can find no warrant for construing the testator's devise and bequest in Paragraph 3 of "all her [the widow's] statutory rights in my real and personal property" as a *pecuniary bequest* to the widow of the *value of an intestate share* in the testator's realty and personalty. Had the decedent intended that the widow have money equal to the value of the share she would have taken if there had been no will, he could easily have so provided. Instead, he did not mention payment in money[5] and he

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[4] There can be no dispute that the will speaks as of death.

[5] *Cf.* Herbert v. Wren, 11 U.S. (7 Cranch) 370 (1813), deciding that a court of chancery cannot allow a part of the purchase money of realty in lieu of dower, when the property is sold, unless all interested parties consent. And *cf.* Magruder v. Magruder, 78 U.S. App. D.C. 378, 380-81, 141 F. 2d 537, 539-40, *cert. denied*, 323 U.S. 711 (1944).

did not mention statutory rights arising upon intestacy. His failure to specify that she was to have the monetary equivalent of the statutory rights she would have had in the case of intestacy seems especially significant in light of the fact that he was then executing a will which would if valid forestall intestacy and would, unless it expressed a contrary intention, operate to cut off her right to an intestate share. The testator's silence as to intestate rights in this situation must be accorded great weight. The words the testator employed gave the widow "all her statutory rights" in his real and personal property, wherever located, and we think this necessarily means such rights as she had in his property under the controlling statutes immediately following his death, *testate*.

It is of course to be presumed that the testator included Paragraph 3 for a purpose. But Paragraph 3 as worded by him does not operate in a vacuum. In the District of Columbia at least[6] there are rights granted to a widow by statute which accrue where there is a will. Under Section 18-201 of the D. C. Code a widow is given the right of quarantine, under Section 18-801 of the Code she is given a family allowance, and under Section 18-201a(a), enacted August 31, 1957, dower rights may accrue to her in certain circumstances. Furthermore, under Section 18-211 a widow may renounce what is given her under the will and elect to take the share of the real and personal estate which she would have taken if there had been no will. Such statutory rights are substantial in nature and all were available to the widow under Paragraph 3 and by

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[6] The statutes of Arizona, Tennessee, and Pennsylvania, cited by the District Court, accord rights in real estate to a surviving widow where her husband dies intestate. It is not our function on this appeal to determine whether the widow may have rights given by statute in the realty located in those states where the owner does not die intestate.

virtue of the cited statutory provisions.[7] Thus, we do not think that a reading of Paragraph 3 in accordance with the language actually used by the testator would produce an irrational result or a result which must be rejected as obviously a provision which he could not have intended. Cf. *Hilton* v. *Kinsey*, 88 U.S. App. D.C. 14, 19-20, 185 F. 2d 885, 890-91 (1950); *Warner* v. *Warner*, 99 U.S. App. D.C. 80, 86, 237 F. 2d 561, 567 (1956). To be sure, the widow might presumably have been entitled to certain of her statutory rights on the death of her husband in any event, whether he died testate or intestate, so that the testator's gift of them may have accomplished little or nothing as a matter of law, but the same can be said of several other provisions of the will. It does not follow, however, that the testator necessarily viewed Paragraph 3 as unnecessary or ineffective. So far as can be determined, it seems likely that the provision in question was inserted because it was believed by him to be helpful or actually needed to assure the preservation to the widow of the statutory rights she might have at his

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[7] We understand that quarantine in the form of four months' rent ($1100) on the apartment occupied by decedent at the time of his death and a family allowance of $500 have been paid in full to the wife under Sections 18-201 and 18-801 of the D.C. Code. The record indicates that the widow has not yet asserted any claim to dower, and that she did not renounce under the will.

It is true, of course, that the widow's right to renounce devises and bequests made in the will, given her by Section 18-211 of the Code, continues for 6 months after administration is granted on the testator's estate, but this fact does not derogate from the conclusion that the right to renounce within that period was a right which became fixed and in effect at the date of the testator's death, testate. Paragraph 3 clearly encompasses this statutory right.

death;[8] or perhaps, as suggested by the children, to strengthen the claim of his estate, through a "bequest" of the widow's statutory rights, to a marital deduction under Section 2056(a) and (e) of the Internal Revenue Code of 1954.[9]

---

[8] We note in this connection that Section 18-210 of the D.C. CODE reads:

> "Subject to the provisions of section 18-212, every devise of real estate or any interest therein, and every bequest of personal estate or any interest therein, to the surviving spouse shall be construed to be intended in bar of his or her share in decedent's estate (including dower rights, if any) unless it be otherwise expressed in the will."

Section 18-212 provides that if the surviving spouse does not renounce,

> "she or he shall be entilted to receive the benefit of all provisions in her or his favor in the will of the deceased spouse and shall share, in accordance with sections 18-101, 18-701, 18-702, 18-703 and 18-704, in any estate of the deceased spouse undisposed of by the will."

Neither the quarantine right under Section 18-201, nor dower rights under Section 18-201a, nor the family allowance under Section 18-801, is specifically mentioned in Section 18-212. The widow's statutory rights under these sections may thus have been thought to need protection by giving them to the wife as a provision of the will.

[9] The decedent's estate was substantial. At the time the will was executed in January 1960 the law as to whether the statutory rights of a surviving spouse would form a basis for a marital deduction under Section 2056 of the Revenue Code appears not to have been settled. *Compare* TREAS. REG. § 20.2056(e)-1(3) and (5) and (e)-2, promulgated June 24, 1958, by T.D. 6296, 23 FED. REG. 4539, *with* Estate of Proctor D. Rensenhouse, 31 T.C. 818, 823 (1959) and Estate of Walter O. Critchfield, 32 T.C. 844, 851 (1959). Subsection (a) of Section 2056 limits the marital deduction to property interests which "passed from" the decedent to the surviving spouse, and subsection (e) provides that a property interest "shall be considered as passing from the decedent" if, inter alia, the interest "is bequeathed or devised" by the decedent. There is evidence that the marital deduction provision had been brought to the testator's attention, and Paragraph 3 of the will may well have been framed with that in mind.

Taking the language of Paragraph 3 alone, we find no justification for rewriting or amplifying it to give the widow an intestate share in the testator's property when she has failed to renounce the will or fulfill any other conditions imposed by statute upon efforts to take as upon intestacy. We turn now to the matter of whether the language used must be so construed because the evidence shows that this in fact was the testator's intention.

II.

The evidence in our view wholly fails to show that the testator actually intended by Paragraph 3 to give the widow the value of the rights she would have had by statute if he had died intestate, in addition to a one-third share of the residue.[10] As already noted, the decedent did not communicate his intention to any person who testified at the hearing. And no reason or motive for so preferring the widow appears. The testator was shown by the evidence to have been on good and affectionate terms with both of his children and with his wife. The wife was not shown to have been in financial need. Rather, her independent income and property were substantial, probably sufficient to care for her needs apart from any bequest, and her financial resources seem at least equal to those of the testator's son and notably more substantial than were those of the testator's daughter.

In addition, Paragraph 9 of the will suggests that there was no intention to favor the widow, other than as Paragraph 3 specifically states, over the two children. There he provided that if the widow did not survive him, the bequest to her of one-third of the residue would lapse, as would of course the bequest of her statutory rights. The children's share in the residue, on the other hand, would not lapse if they did not survive, but would go to

[10] Expressed in percentages, the division ordered by the District Court (a one-third share in all realty and personalty plus a one-third share of the residue) would give the widow approximately 56%, and the two children 22% each, of the net estate.

their children (the testator's grandchildren, to whom he gave small specific legacies). The lapse provisions seems most inconsistent with a view that the wife was to be preferred in a monetary way, except as allowed to her by statute. Furthermore, on the day he executed his will and subsequently, the testator acted to bring some of the insurance he carried into conformity with a one-third division of his property between his wife and children, the wife's share to lapse if she did not survive.[11]

We do not think that the acts and statements of the drafting attorney, shown by the evidence, purport to show the testator's actual intention with respect to Paragraph 3. Nor do we construe them as expressing any opinion by the attorney as to how that paragraph should be construed.

We conclude that, giving due weight to the evidence produced, the testator's choice of language for Paragraph 3 bars the view that he intended by that paragraph to give his wife a pecuniary bequest measured by the value of the rights she would have had by statute if he had died intestate. We construe Paragraph 3 to mean that he intended his wife to have those rights in his real and personal property as were conferred upon her by statute as of the date of his death testate and which were available to her absent renunciation within the statutory period—this in addition to her share of the residue under the will.

The order of the District Court is

*Reversed with directions to enter an order construing the will in a manner consistent with this opinion.*

---

[11] This was accomplished with respect to one policy, but not in respect of two others as to which the testator before his death indicated to the representative of the insurance company that he desired to change the designation of beneficiaries to conform with his will. His two children divided about $20,000 of insurance proceeds after his death, in which the widow did not share.

FAHY, *Circuit Judge, dissenting*: All parties to the case are agreed that the will was prepared for the testator by an experienced draftsman. And though Paragraph 3 is nevertheless not altogether clear, it seems to me well nigh incredible that an experienced draftsman would have composed this provision as she did if the intention she sought to express were the wholly unnecessary one that the widow should have her statutory rights of quarantine, family allowance and renunciation, which were hers without any provision for them in the will.[1] Moreover, if the intention were to protect such rights Paragraph 3 would not have been worded as a gift, devise and bequest. The language of Paragraph 3 is as follows:

> I give, devise and bequeath to my wife . . . all her statutory rights in my real and personal property wheresoever the same may be situated or located. . . .

I think this should be given meaning as a devise and bequest; and so I consider the content or measure of the gift. This is sufficiently clear even though not entirely so. The measure of the devise and bequest, adhering to its language, is found in those statutory provisions describing a widow's share in the real and personal property of a deceased husband, wheresoever the same is situated; that is, the provisions of the statute are by reference made the measure of the gift.[2]

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[1] The majority suggests that Paragraph 3 might have been included in order to bring these statutory benefits within the scope of the estate tax marital deduction. The trial court in reaching its decision in the remand proceedings specifically dealt with this issue and rejected the position now taken by the majority. Even assuming that Paragraph 3 has some tax value this does not explain its general and all-inclusive language, which goes far beyond what is necessary to provide the relatively small tax savings suggested by the majority.

[2] These statutory rights are set out at 18 D.C. Code § 101 and 18 D.C. Code § 703; they are those to which a widow is entitled upon the death of her spouse intestate.

Thus I think the District Court reached essentially the correct conclusion. The court described the bequest as a "pecuniary" one of the value of the widow's share measured as I have indicated. Perhaps it could better be described as the bequest of the share itself, rather than as a "pecuniary" one; but this difference is not significant.

It is true, as the opinion of the court states, the will, including of course Paragraph 3, speaks of the time of the testator's death, and at that time one of the rights of the widow was the right to renounce the will and take the share she would take had testator died intestate. But the assumption made by the court that Paragraph 3 may have been included to protect this as well as the widow's other statutory rights does not seem to me to support the court's construction of that paragraph. The right of renunciation is the only statutory right left unprotected at the time of death, for it depends upon affirmative action by the widow within six months after administration of the estate. Under the trial court's construction Paragraph 3 gives the widow as a devise and bequest the share she would take in the event of intestacy even though she should fail to exercise the right of renunciation within the time required by statute. This court's construction of Paragraph 3 gives no protection to the right of renunciation.

The question in the final analysis is whether the contested provision is a gift, devise and bequest of a share in the testator's estate measured by his widow's statutory share had he died intestate, or is merely a declaration by him that his widow shall have the incidental statutory rights she would have had in any event. I think the language used by testator shows he intended more than the latter. He explicitly made a gift, devise and bequest. This is not language he would have used, with the assistance of an experienced draftsman, to accomplish nothing for his wife except, by indirection, the possible tax benefits referred to in note 1, *supra*.

I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
SEPTEMBER TERM, 1964

Civil 270-63

No. 17,830

JOAN BAIN NICODEMUS, ET AL., *Appellants,*

v.

LILLIAN WALL BAIN, *Appellee.*

Before: BAZELON, Chief Judge, and FAHY, WASHINGTON, DANAHER, BURGER, WRIGHT, McGOWAN, TAMM, and LEVENTHAL, in Chambers.

**Order**

On consideration of appellee's petition for rehearing *en banc*, and of appellants' answer thereto, it is

ORDERED by the court *en banc* that appellee's aforesaid petition be denied.

Per Curiam.

Dated May 6, 1965

Circuit Judges Fahy, Danaher, and Burger would grant appellee's petition for rehearing *en banc*.

Circuit Judges Tamm and Leventhal did not participate in the foregoing order.